No. 6483

United States
Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Appellant,

—vs.—

COVE IRRIGATION DISTRICT,
a corporation,

Appellee.

Petition for Rehearing

STERLING M. WOOD
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Attorneys for Appellant.

Filed....., 1931

..... Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

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Comes now the Appellant in the above entitled action, by and through the undersigned, its attorneys, and respectfully petitions the Court for a rehearing therein upon the grounds and for the reasons following, to-wit:

1. That the decision of the Court herein has disregarded the stipulation upon which the appeal was heard, and is likewise contrary to the record on appeal, and,

2. That the decision of the Court herein disregards and is in conflict with settled and controlling rules of fundamental law.

In support of the foregoing petition for rehearing we, the undersigned attorneys for the Appellant, hereby certify, in compliance with the rules of this Court, that the petition for rehear-

ing here presented is, in our judgment, well founded, and that it is not interposed for delay.

Dated at Billings, Montana, this 6th day of January, A. D. 1932.

STERLING M. WOOD,
ROBERT E. COOKE,
Attorneys for Appellant.

OUTLINE OF ARGUMENT

ARGUMENT

I.

THE COURT'S DECISION OF DECEMBER 14, 1931, IS CONTRARY (A) TO THE STIPULATION UNDER WHICH THE APPEAL WAS HEARD, AND, (B) TO THE RECORD ON APPEAL.

Subdivisions (A) and (B) will be considered together.

The Court in its said decision says:

> "The findings of the Court determined the amounts to be allowed as follows: Queenan, $1737.62, interest from February 2, 1923; Fallman, $2027.00, interest from March 1, 1923; Wickliff, $3087.00, interest from March 3, 1923; Kunkle, $850.00, interest from December 24, 1922; Yegen, $1324.00, interest from February 1, 1923; Martin, $7396.41, interest from December 5, 1922; Kurk, $562.30, interest from January 1, 1923; Total, exclusive of interest, $16,984.43. The interest rate used was stated to be eight per cent. per annum. The principal sum of the judgment was $17,963.72. Interest included, therefore, is the difference between the amounts last given or $979.29."

With entire deference to the Court, we respectfully submit that these quoted statements from its decision herein are contrary to fact, contrary to the record, and contrary to the stipulation of counsel made in open court at the time this appeal was argued. The conclusion reached by the Court in its decision rests upon the foregoing figures. Basing its conclusion upon them the Court has decided that the judgment entered "does not include enough interest to correspond" to the findings. Therefore, the Court has ruled that the Appellant is entitled to no relief upon this appeal.

The case was submitted, as will be pointed out presently,

upon the proposition that the principal sum awarded by the judgment was $10,870.40 (Tr. (2) 16, and the schedule hereinafter mentioned set forth upon page 31 of Appellant's brief) —not $16,984.43 as the Court says in the matter, supra, quoted from its decision. The schedule in question shows the separate amounts demanded in the amended complaint and those finally allowed by the trial court. The fault to be found with the figures, supra ,used by this Court in its decision is that, mistakenly, they have been taken as sums found to be payable by the trial court. Actually they are sums the Appellee herein requested the trial court to find to be payable.

The Court has overlooked the fact that, at the time of oral argument, and when a typewritten transcript of the evidence taken at the trial was submitted by both counsel to the Court to be considered upon this appeal, the attorneys for Appellant and Appellee then agreed in open Court, since the record did not supply all the facts and it was desirable to have the merits of the controversy settled, that the transcript in question should be used in the disposition of this appeal, as well as the schedule set forth upon page 31 of Appellant's brief, that the schedule is correct and that it shows the amounts of principal found by the Court below to be payable to each claimant. This schedule was particularly called to the Court's attention at the time of oral argument and was the subject of discussion between the members of the Court and counsel. For the convenience of the Court the schedule is set forth again herein. As stated, it shows the principal amounts demanded in the amended complaint and the principal sums for which recovery was allowed by the lower court for the use and benefit of the various claimants, viz:

	Amount Demanded	*Amount Recovered*
B. A. Kurk	$ 1163.20	$ 562.30
E. C. Riley	1081.45	.....
W. H. Queenan	1542.62	.....
C. F. Wickliff	3787.00	368.83
J. J. Fallman	2110.17	368.76
John I. Kunkle	880.00	850.00
Dave C. Yegen	1324.00	1324.00
B. J. Martin	6753.32	6753.32
B. J. Martin	643.19	643.19
	$19284.95	$10870.40

It is, therefore, clear that Appellant has the right to demand that this appeal be determined upon basis of the figures in the schedule mentioned, that is, the figures showing the amount of principal found to be payable to each claimant by the lower court. The difference between such figures and those used by the Court in its decision herein is apparent at a glance. Thus, Queenan was allowed nothing at all, but this Court has said in its decision that the court found for Queenan in the sum of $1737.62 with interest from February 2, 1923. The court found for Fallman in the principal amount of $368.76, not $2027.00, as this Court has said. Wickliff was awarded only $368.83 but this Court states the amount is $3087.00. The remaining figures used by the Court herein are correct.

The judgment rendered from which this appeal is taken includes the sum of $7093.32 interest, not $979.29 as this Court has said. This interest figure of $7093.32 is reached by deducting the amount recovered, or principal sum of $10,870.40, supra, from the amount of the judgment, (Tr. (2) 15) of $17,963.72. Accepting as correct the conclusion of the Court that the claims of all claimants, other than Yegen and Martin, draw interest from the dates of completion of services rendered to the date

ERRATA

The following changes are hereby made on page 7. Substitute J. J. Fallman for C. F. Wickliff in the schedule there printed, and add the name C. F. Wickliff to the statement, showing $368.83 recovered by him, $234.29 interest recoverable, and $603.12 as the total recoverable by him. This changes the total of the statement from $11644.98 to $12248.10 and corresponding changes should be made where that total is elsewhere mentioned.

of the judgment, the following figures, it is believed, will be found to be correct:

Name of Claimant	*Principal Amount Recovered*	*Interest Recoverable*	*Total*
B. A. Kurk	$ 562.30	$365.55	$ 918.85
E. C. Riley	None	None	None
W. H. Queenan	None	None	None
C. F. Wickliff	368.76	232.66	601.42
John I. Kunkle	850.00	554.20	1404.20
Dave C. Yegen	1324.00	None	1324.00
B. J. Martin	6753.32	None	6753.32
B. J. Martin	643.19	None	643.19
Total			$11644.98

Interest, as calculated, supra, has been figured from the respective dates upon which work was completed to the date of the judgment and at the rate of 8% per annum. Therefore, accepting the Court's theory of the law of this case as announced in its decision herein, the judgment, upon the case as submitted upon this appeal, should be for $11,644.98 instead of for $17,-936.72. The judgment of the lower court should be reversed, instead of affirmed, or be modified as stated.

This Court in its decision has wholly overlooked the fact that the lower court, after the mandate of this Court in the case in 42 Fed. (2d) 957, did not make any findings of fact, as such. Counsel for the Appellee, after such mandate, filed a renewed request for findings of fact and conclusions of law. (Tr. (2) 2, et seq.) Thereafter (Tr. (2) 13) the lower court adopted as its findings and conclusions of law the findings and conclusions presented in the renewed request of the Appellee, *but with certain exceptions.* Thus the Court says in its order:

"It is ordered that the within findings and conclusions

(meaning those incorporated in the renewed request of the Appellee) be and the same are hereby adopted, approved and made as and for the findings of fact and conclusions of law by the court, *with the exception of findings numbered 10, 11 and 12, which are hereby modified to conform to objections by defendant, numbered 2, 3 and 4;* otherwise and in other respects the objections by defendant are overruled and denied." (Tr. (2) 13)

Therefore this Court has erred in using, as it has done in its decision herein, the figures in the *requested* findings. These requested findings were not adopted in toto as the trial court's findings. As pointed out, supra, certain of the findings requested were modified by the court. Because the court, in its order, did not indicate to what extent they were modified, the schedule above mentioned was prepared and printed in Appellant's brief. Then, in open court, counsel for both parties agreed that this schedule was correct and should be used in the determination of this appeal. By the schedule and the stipulation this Court was given exact figures; but this Court has erroneously used as a basis for its decision the figures in the *requested* findings instead of those in the findings made.

This Court has referred to the typewritten transcript of the evidence in deciding this case, which transcript was tendered as a part of the stipulation of counsel so made in open court, although the transcript is not, strictly, a part of the record, as such. Therefore, justice certainly requires that the oral stipulation be considered in its entirety in the decision by this Court. In other words, the schedule showing the amounts of principal actually allowed each claimant by the lower court must also be considered or the case will be unfairly decided. A consideration of that schedule by this Court will establish at once that the decision herein of December 14, 1931, is erroneous. But apart

from the schedule in question this Court cannot justify the figures it has used. It cannot ignore the fact that under the order of the lower court (Tr. (2) 13) the requested findings were modified in part and, therefore, that the requested findings are not the trial court's findings.

It is, therefore, respectfully submitted, upon the foregoing ground alone, that this petition for rehearing is justified, and should be granted. The decision rendered is, mistakenly of course, based upon a false premise, that is, one that is contrary to fact.

II.

UPON THE RECORD AND THE LAW THE JUDGMENT OF THE LOWER COURT MUST BE REVERSED.

At the time of oral argument herein this appeal was presented in a most informal manner. The submission was informal in that matter not a part of the record was discussed. It was further informal because by oral agreement of counsel in open court this Court was requested to consider all such matter that was not a part of the record (such as the typewritten transcript of the evidence that was not in a bill of exceptions and the schedule of the amounts awarded each claimant) to the end that a decision on the merits might be rendered—one that was on the merits in every sense of the word and that would end the controversy without further consideration of merely procedural questions.

But unless this case is to be so decided upon the merits and, thus, upon all the facts submitted at the time of oral argument, whether in the record or not, necessarily Appellant must stand upon the record alone. Thereunder it is believed that the judgment below cannot be sustained, but must be reversed.

In the assignment of errors in the court below (Tr. (2) 19 and 20) and again in the specifications of errors in Appellant's brief in this Court (Page 7 thereof) it is contended, expressly, that the lower court erred in the making and entry of its judgment of February 18, 1931, in that (a) the judgment is contrary to law, and (b) the judgment is not supported by the record in the action.

It appears from the record in this case that after the mandate of this court in 42 Fed. (2d) 957 there was no trial of the action. Yet in 42 Fed. (2d) 957 the mandate of this Court merely

reversed the judgment then outstanding, "with directions to take further proceedings not out of harmony" with the Court's decision. This action is one at law. Originally it was tried to the court without a jury under written stipulation waiving a jury. Yet when the case was remanded, under the mandate mentioned, no further trial occurred. Counsel for the Appellee here, plaintiff in the court below, then merely filed a renewed request for findings of fact and conclusions of law. (Tr. (2) pages 2 to 12) Thereupon the lower court by order adopted as its findings, with certain modifications, the findings proposed in the renewed request. That order of the Court points out expressly that the findings were so adopted over objections by defendant, the Appellant here. (Tr. (2) 13) There is nothing in the record before this Court to show that a jury was waived, either in writing or otherwise, after the mandate of this court in 42 Fed. (2d) 957.

The foregoing briefly epitomizes the condition of the record before the Court. We thus have upon this appeal an action at law, where a jury has not been waived, which the lower court has decided without any trial whatsoever, either with or without a jury, and in which its findings are necessarily based upon evidence taken at a former trial. At such former trial the judgment was for the Appellant here and was reversed by this Court upon appeal. It should be apparent, without argument, that this procedure is without any warrant of law whatsoever, and is in disregard of constitutional guaranties. In Cyc of Federal Procedure, Volume 4, Paragraph 1380, page 874, the author says:

"A statutory waiver of jury trial in the first trial of a

cause is not a waiver of a trial by jury in a later trial of the same action."

Again in Volume 6, paragraph 3071, the author says:

"Assuming that something more than to execute the judgment or to enter a judgment as directed and execute that remains to be done, the mandate will govern, if it directs what is to be done; otherwise it implies that the ordinary course will be followed to complete the necessary procedure. A direction in the mandate in an action at law for certain named proceedings after mandate is, in the absence of anything in the mandate or opinion indicating a different intention of the appellate court, to be construed as referring to such proceedings as they are commonly known and administered in federal courts of law; and in equity such as are normal in federal equity courts."

In Northern Pacific Railway Company vs. Van Dusen-Harrington Company, 34 Fed. (2d) 786, the court says:

"A stipulation on the first trial of a law case, waiving a jury, does not affect the right of either party to demand trial by jury after the judgment of the first trial has been reversed and the cause remanded. * * * This being so, and a finding of fact in a jury-waived action being the equivalent of a verdict of a jury, it must therefore be the law that when a party to such an action has secured a finding of fact in his favor, the Circuit Court of Appeals cannot, upon a reversal of the case for the reason that this finding of fact was not justified by the evidence, direct the entry of judgment, but can only order a new trial."

Such is the exact situation here. Originally when the case at bar was first tried the decision was in favor of the surety company upon appropriate findings. That decision was reversed by this Court in 42 Fed. (2d) 957, and the mandate above mentioned then issued. However, a new trial did not take place, which is clearly contrary to law.

In Northern Pacific Railway Company vs. Van Dusen-Har-

rington Co., supra, a new trial was granted in a law action that had been tried theretofore to the court without a jury under the usual stipulation. After the first trial of the action the judgment was reversed in the Circuit Court of Appeals and its mandate, as the mandate involved in the case at bar, merely reversed the judgment and remanded the cause for further proceedings in accordance with the court's opinion. See 32 Fed. (2d) 466, and 470. Hence the case could be disposed of only by a new trial.

In Burnham, et al. vs. North Chicago St. Railway Co. 88 Fed. 627, decided by the Circuit Court of Appeals for the 7th Circuit, paragraphs 1 and 3 of the syllabus of the case read as follows:

> "Where a judgment based on agreed facts is reversed and the cause remanded on the ground that the facts stipulated are evidential only, and cannot take the place of findings, a new trial is required, in which either party has the right to introduce additional evidence not inconsistent with the stipulation."

> "Where by stipulation a jury is waived, and a cause tried to the court, such stipulation does not operate as a waiver of a jury on a second trial, after the judgment has been reversed and the cause remanded."

Such, too, is the doctrine of the Circuit Court of Appeals of the 8th Circuit, as announced in F. M. Davies Co. vs. Porter, 248 Fed. 397.

As pointed out, supra, unless the mandate of the appellate court otherwise provides, a direction in a mandate in an action at law for certain named proceedings after mandate is to be construed to require proceedings as they are commonly known and administered in federal courts of law. The Constitution

of the United States in the Seventh Amendment thereof preserves the right of trial by jury in suits at common law, such as the action now before the Court, and expressly requires that no fact triable by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

In Mutual Reserve Life Insurance Co. vs. Heidel, 161 Fed. 535, decided by the Circuit Court of Appeals for the 8th Circuit, the court says:

> "A trial according to the course of the common law is a trial before a jury under right rulings made by the trial judge in the absence of the jury, *and the only remedy for prejudicial errors in a national court is a new trial.*" (Citing numerous cases)

The question here involved is settled by controlling authority in the case of Capital Traction Co. vs. Hof, 174 U. S. 1, 43 L. Ed. 873 and 876. There the court, quoting from a decision by Mr. Justice Story, says:

> "But the other clause of the amendment is still more important; and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings.' 3 Pet. 446-448 (7: 736, 737)
>
> This last statement has been often reaffirmed by this court."

Therefore the judgment appealed from in the case at bar is contrary to law and not supported by the record. No trial

of any sort has been had since the mandate of this Court in 42 Fed. (2d) 957. Yet the case could be disposed of under the law only by a new trial. Therefore, in this view of the case the judgment of the lower court must be reversed and the case must be remanded for a new trial. It is well settled law that an appeal from a judgment is a sufficient exception to the judgment.

Fellman vs. Royal Ins. Co. 185 Fed. 689.

Under the foregoing argument it is clear that the petition for rehearing should be granted.

Respectfully submitted,

STERLING M. WOOD

ROBERT E. COOKE,

Attorneys for Appellant.

Service of the within and foregoing Petition for Rehearing and receipt of copy thereof acknowledged this..... day of January, A. D. 1932.

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Attorneys for Appellee.